

White Collar Defense and Investigations & Securities Litigation and Enforcement Groups

To: Our Clients and Friends

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APPEALS COURT REJECTS PRIVILEGE FOR CLIENT COMMUNICATIONS TO COUNSEL INTENDED TO BE SHARED WITH AUDITORS

Likening a corporate internal investigation to a "treacherous path," a recent U.S. appeals court decision underscores the risks to a claim of attorney-client privilege that can result from sharing information with a corporation's outside auditors.

The decision earlier this month by the U.S. Court of Appeals for the Ninth Circuit was issued in a criminal case that originally attracted wide attention because the District Court judge barred federal prosecutors from introducing at a criminal trial statements made to company counsel by the Chief Financial Officer of Broadcom Corp.

His statements were barred by the District Court because the CFO was being represented at the time he made the statements by the same counsel who was representing the corporation.

The appeals court, however, reversed the decision barring the statements from the criminal trial. It held that even if the CFO was being represented by the company's counsel at the time of the interview, the contents of the interview were still not privileged, because the CFO understood that the results of the interview were going to be shared with a third party, the company's outside auditors.

Thus, the unanimous decision by a Ninth Circuit three-judge panel means that the prosecutors can use statements made during the investigative interviews in the trial of William J. Rühle, Broadcom's former CFO. The case, *United States of America v. Henry T. Nicholas, III and William J. Rühle*, arises out of the federal grand jury's indictment of Rühle and Broadcom co-founder Henry T. Nicholas III on charges of conspiracy and securities fraud alleging that the two executives were secretly backdating Broadcom stock options from 1999 to 2005 to enrich certain company employees.

The Ninth Circuit rejected the analysis of the District Court. Finding that Ruehle had reasonably believed that the attorneys represented him during the interview, the District Court applied a presumption in favor of the privilege, and placed the burden on the government to overcome that presumption. The District Court primarily relied on California state law.

The Ninth Circuit, however, held that federal common law, not state law, should apply to privilege claims in federal court. And under that law, it held, the burden was on the party seeking to assert the privilege to prove that the elements are met.

The key missing element, according to the Ninth Circuit, was the requirement that in order for the privilege to attach, the parties to the communication must have an expectation of confidentiality. Here, Ruehle's statements to the lawyers were not "made in confidence," as required for the privilege, "but rather for the purpose of disclosure to the outside auditors." That meant no privilege applied, the court held.

When the District Court's decision was first reported, it was seen as a potential warning sign for attorneys and executives conducting corporate investigations. While the Ninth Circuit decision overrules that opinion and its analysis, it nonetheless reaffirms the complexities of privilege issues in internal investigations, and the need for counsel and executives alike to exercise great care when traveling on that "treacherous path."

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